Penn
University of Pennsylvania

Office of the Vice Provost for Research

September 29, 2005

Defense Acquisitions Regulations Council
Attn: Ms. Amy Williams
OUSD (AT&L) DPAP (DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062

Re: DFARS Case 2004-D010

Dear Ms. Williams:

The University of Pennsylvania is writing to comment on the Notice of Proposed Rule Making (DFARS Case 2004-D010) to amend the Defense Federal Acquisitions Regulation Supplement (DFARS) to address the disclosure of export-controlled information and technology under DOD contracts.

General Policy Considerations

According to the National Science Foundation, in 2002, international students who were not U.S. citizens received 58.7% of all doctorates awarded in engineering in the U.S., 35.4% of all doctorates awarded in the physical sciences, and 18.0% of all doctorates awarded in the life sciences.[1] Many of these students stay in the U.S. after completing their studies, contributing significantly to this country's scientific productivity and economic development, and in order to help the U.S. continue to compete in these crucial fields, universities need to encourage non-residents to come to the U.S. to study science and technology disciplines.[2]

Universities are important performers of Department of Defense 6.1 and 6.2 research either directly through grants, contracts or as subcontractors. While the dollar value of contract awards to universities may pale in comparison to for-profit corporations, universities are important performers of fundamental research and have played an important role in advancing national security and technological innovations. We believe that for a number of reasons, the proposed

[1] See "Policy Implications of International Graduate Students and Postdoctoral Scholars in the U.S.", available at National Academies' web site, http://www.nap.edu/books/0309096138/html/ [last visited September 22, 2005]
[2] Ibid.

rule as written will greatly hinder universities' abilities to work on fundamental research questions of vital interest to the Nation.

Specific Considerations

The Department of Commerce Bureau of Industry and Security (BIS) is currently considering over 300 letters of comment on proposed changes (ANPR; RIN 0694-AD29—Fed. Reg. 3/8/05) to the Export Administration Regulations (EAR) that would have a direct impact on the prescription (204.73XX) and the wording and applicability of the proposed clause at Part 252.204.73XX. The proposed changes to the EAR would have a profound impact on the interpretation of deemed exports under the export control regulations. Significant numbers of commentators have suggested that a more restrictive interpretation of "use" of controlled technologies would significantly impede vital work at universities. Since universities in general may "use" what otherwise may be controlled technologies in conducting fundamental research, we would urge the Department of Defense to await the resolution of Commerce's proposed rules prior to attempting to impose changes in contract provisions.

The proposed DFARS regulations are inconsistent with a number of existing federal policy statements; would impose, as a matter of contract, export control regimes that fail to recognize existing exclusions and exemptions from the EAR, and would leave to the contracting officer determinations whether a contract was subject to the EAR, a function currently ultimately adjudicated by the Department of Commerce.

National Security Decision Directive (NSDD) 189, issued in September 1985, established the federal government's policy for controlling information and technology developed through federally-funded research at universities and research institutions. NSDD 189 states that the federal government's mechanism for controlling information generated through federally-funded research (to the extent it is deemed to be sensitive for national security reasons) is the "classification" system. In November 2001, then National Security Advisor, Dr. Condoleeza Rice reaffirmed NSDD 189 as the federal government's policy. By failing to expressly recognize the fundamental research exclusion from export controls, the July 12, 2005 Federal Register notice will, at best, create ambiguity, and has the potential to subject all DoD-funded research at the University to the export control regulations. This would be directly inconsistent with NSDD 189. In addition, this clause is inconsistent with DoD Instruction 5230.27, Section 4.3 which states: *The mechanism for control of information generated by DoD-funded contracted fundamental research in science, technology and engineering performed under contract or grant at colleges, universities, and non-government laboratories is security classification. No other type of control is authorized unless required by law.*

Under the proposed prescription and contract clause, determinations of whether export controls are applicable to a body of work would be made by the contracting officer. Even if the agency's Technical Representative were involved in that determination, we feel that would be insufficient to necessarily invoke the EAR controls. Determinations of the applicability of EAR controls is fact driven, that is, is dependent on the foreign national, the technology involved, and its use. The need for a license is ultimately determined by BIS based on these facts. Therefore, the determination that a contracting officer may make is insufficient to require a license or to apply the EAR to the contract work. Further, DOD contracting officers are likely to default to use of the proposed new clause in most if not all university research contracts. If this clause is included in a contract, the access control requirements might inappropriately be interpreted to be a matter of contract compliance, regardless of whether the research otherwise is excluded from controls or exempt from licensing requirements.

Specific prescriptions in the proposed clause for badging of employees who are foreign nationals or specific prescription of other elements for controlled access go beyond even the general safeguarding principals enunciated in the National Industrial Security Program Operating Manual at 5-100 for **classified** material: *"..The extent of protection afforded classified information shall be sufficient to reasonably foreclose the possibility of its loss or compromise."* Putting aside the question of whether standards for non-classified information or technologies should be more stringent or even as stringent as those for classified materials, contractors using information or technologies that are officially determined by BIS to be export controlled should have the flexibility to devise programs and physical segregation that are commensurate with protection needs.

From a University perspective the notion of badging one group of individuals and segregating them from open research facilities is abhorrent and not concordant with the notion that free exchange of information and knowledge is an inviolable principle of academic research, is inimical to the pursuit of knowledge, and may violate antidiscrimination laws. Herein, we would argue that visa processes should suffice to control access to the United States and that once admitted, foreign nationals not be subject to further controls with respect to use of export controlled technologies and information while conducting fundamental research. Since this recommendation is being considered by BIS, we again submit that the DFARS proposed prescription and accompanying contract clause are premature.

We are especially concerned that the proposed contract language mandates flow down of the clause to subcontractors without regard for export control exclusions or exemptions. Penn is often a participant as a subcontractor to other organizations for work contracted by the Department. In that role, the University's work will often be limited to "contracted fundamental research" (DOD Instruction 5320.27). Without specific instructions to the both the agency contracting officer and the prime contractor, the prime contractor will automatically seek to pass

down this clause without regard for its applicability to the actual work being subcontracted. Universities will spend needless amounts of time, often dealing with unsympathetic contracting officers negotiating the removal of this clause.

At the September 16, 2005 National Academies Workshop on the DFARS proposed rule making, DOD representatives sought suggestions for alternative language to the prescription at 204.73XX and the contract clause at 252.204.73XX. We have reviewed the alternate language that is being provided by the Council on Governmental Relations and are fully supportive of the proposed language.

We appreciate the opportunity to comment on the proposed revisions to the DFARS regulations and look forward to the Department's response to these serious issues.

Sincerely yours,

/s/ PBMolinoff

Perry B. Molinoff, MD